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92-528
No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether aliens outside the United States have rights under the Due Process Clause of the Fifth Amendment in connection with their attempts to enter the United States.

2. Whether the respondent Haitian interdictees' claim of such a due process right is barred under collateral estoppel principles by the class action judgment of the district court in *Haitian Refugee Center, Inc.* v. *Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 112 S. Ct. 1245 (1992), which held that interdictees outside the United States have no rights under the Due Process Clause.

PARTIES TO THE PROCEEDINGS

The petitioners are Lawrence Eagleburger, the Acting Secretary of State (substituted as a party pursuant to Rule 35.3); William P. Barr, the Attorney General; Gene McNary, the Commissioner of the Immigration and Naturalization Service; Rear Admiral Robert Kramek and Admiral J. William Kime, United States Coast Guard; and the Commander of the United States Naval Base at Guantanamo Bay, Cuba.

The respondents are the Haitian Centers Council, Inc.; the National Coalition for Haitian Refugees, Inc.; the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut; and the following individual Haitian nationals: Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre and Mathieu Noel. The individual respondents brought the action on behalf of others similarly situated with respect to the interdiction program, including subclasses consisting of Haitian migrants who had been "screened in" or "screened out" or were awaiting screening; relatives of such individuals; and Haitian migrants who had retained one of the respondent organizations to represent them. Compl. ¶¶ 36-41 (92-6090 C.A. App. 25-26).

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v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of the Immigration and Naturalization Service, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion at issue here (Pet. App. 73a-124a)[1] is reported at 969 F.2d 1326, and its subsequent opinion (Pet. App. 1a-72a) is reported at 969 F.2d 1350. The district court's opinions on the question presented here (Pet. App. 125a-141a, 142a-163a) and its subsequent opinion (Pet. App. 164a-168a, 169a-170a) are not yet reported. The Eleventh Circuit's opinions in *Haitian Refugee Center (HRC)* v. *Baker* (Pet. App.

[1] Hereinafter, "Pet. App." refers to the appendix to the petition in *McNary* v. *Haitian Centers Council, Inc.*, petition for cert. pending, No. 92-344 (filed Aug. 24, 1992).

171a-190a, 191a-252a) are reported at 949 F.2d 1109 and 953 F.2d 1498, respectively. The district court's December 3, 1991, opinion in *HRC* v. *Baker* (Stay App. 168-230)[2] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. A petition for rehearing was denied on July 24, 1992. App., *infra*, 1a. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AMENDMENT, TREATY, STATUTORY PROVISION, EXECUTIVE ORDERS, AND INTERNATIONAL AGREEMENT INVOLVED

The Due Process Clause of the Fifth Amendment and the September 23, 1981, Agreement Between the United States and Haiti are reproduced at App., *infra*, 2a-5a. Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150; Section 243 of the Immigration and Nationality Act, 8 U.S.C. 1253; and Executive Orders Nos. 12,324 and 12,807 are reproduced at Pet. App. 253a-265a.

STATEMENT

This certiorari petition arises out of litigation in the United States District Court for the Eastern District of New York challenging various aspects of the program established by the President to address the crisis resulting from the massive outflow of migrants from Haiti in small, unseaworthy boats. In our pending certiorari petition in *McNary* v. *Haitian Centers Council, Inc.*, No. 92-344 (filed Aug. 24, 1992), we seek review of the Second Cir-

[2] "Stay App." refers to the appendix to the emergency application for a stay pending certiorari that we filed in this Court on July 30, 1992, seeking a stay of the Second Circuit's July 29, 1992, decision.

cuit's July 29, 1992, decision in the same litigation, which directed entry of a preliminary injunction barring implementation of Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992). That Order, issued by the President on May 24, 1992, authorizes the Coast Guard to repatriate directly to Haiti all Haitian migrants interdicted while attempting illegal entry into the United States.

In the instant certiorari petition, we seek review of a separate decision of the Second Circuit dated June 10, 1992, which affirmed a preliminary injunction entered by the district court prior to the May 24 Executive Order. At that time, interdictees who were found to have a credible claim of refugee status were tentatively "screened in" and were generally brought to the United States, where they could formally apply for asylum. However, some interdictees who were screened in also were found to have a communicable disease of public health significance. Such aliens are statutorily excluded from entry, and may be admitted to the United States as refugees only if the Attorney General grants a special waiver. The Immigration and Naturalization Service (INS) decided to conduct further interviews of those interdictees at the U.S. Naval Base at Guantanamo Bay, Cuba, to determine whether they in fact satisfy the statutory definition of "refugee" before deciding whether such special relief is appropriate.

In its June 10 decision, the Second Circuit barred petitioners from interviewing or repatriating any of the affected interdictees to Haiti without first affording them access to an attorney. The court found that these interdictees raised a "serious question" as to whether the Due Process Clause affords them a right to counsel. Pet. App. 104a-118a. That ruling is utterly without merit. The Due Process Clause has no application to aliens outside the United States in connection with their efforts to enter this country. Indeed, respondents are collaterally estopped by the holding to that effect in the *HRC* v. *Baker* class action.

1. The program for interdicting would-be illegal migrants on the high seas was instituted in 1981. In Executive Order No. 12,324, issued in that year, the President directed the Coast Guard to intercept vessels suspected of transporting illegal migrants and to return the passengers to their country of origin, subject to a proviso that any "person who is a refugee" would not be repatriated without his consent. § 2(c)(3), 46 Fed. Reg. 48,109 (1981). Contemporaneously, the United States entered into an agreement with Haiti permitting U.S. officials to interdict and board Haitian flag vessels suspected of carrying illegal migrants. Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. 10,241.

To implement Executive Order No. 12,234, the INS promulgated internal guidelines under which INS officials conducted informal, non-adversarial "screening" interviews of interdictees on board Coast Guard cutters. Any interdictees who made a credible showing of political refugee status were tentatively "screened in" and were paroled into the United States, where they could file a formal application for political asylum under 8 U.S.C. 1158—and, in the process, attempt to establish that they were in fact refugees within the meaning of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(42)(A). Interdictees who were unable to make that threshold showing were "screened out" and repatriated immediately to Haiti. Pet. App. 75a-76a, 193a-197a.

2. The United States temporarily halted repatriation of interdicted Haitians following the military coup in Haiti on September 30, 1991. Repatriations resumed on November 18, 1991, after the immediate post-coup violence subsided. Pet. App. 76a, 144a, 197a. On November 19, 1991, Haitian Refugee Center, Inc. (HRC), and others filed suit (*HRC* v. *Baker*) in the United States District Court for the Southern District of Florida. They alleged, *inter alia*, that the INS had committed "procedural violations" in determining whether interdicted

Haitian migrants should be repatriated, and they sought relief under, *inter alia*, the Fifth Amendment. *HRC* 2d Amend. Compl. ¶¶ 52-61 & Relief Sought (92-6144 C.A. App. 645-648, 651). On the day the complaint was filed, the district court entered a temporary restraining order barring repatriation of any interdictees. Stay App. 114-116. Because interdictions were continuing at a high rate and Coast Guard vessels were seriously overcrowded, U.S. officials decided to house interdictees temporarily at the U.S. Naval Base at Guantanamo Bay, Cuba. Cummings Decl. ¶ 11 (Stay App. 122-123).

The district court in *HRC* subsequently certified a plaintiff class consisting of (Pet. App. 87a):

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval Base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

On December 3, 1991, the district court in *HRC* entered a preliminary injunction that continued the prohibition against repatriations. The court relied on what it found to be a First Amendment right of plaintiff HRC to have access to the interdictees, and on Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, which provides that a Contracting State shall not "expel or return ('refouler')" a refugee to a country where his life or freedom would be threatened, *inter alia*, on account of political opinion.[3] Stay App. 168-230. At the same time, the court rejected the plaintiffs' claim based on the Due Process Clause. It explained that although "[a]liens who successfully enter the United States are entitled to due proc-

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[3] The United States acceded to Article 33.1 of the Convention by ratifying the United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

ess protections with respect to immigration matters," "the United States Supreme Court 'has long held that an alien *seeking* admission to the United States requests a privilege and has no constitutional rights regarding his application.'" *Id.* at 220 (quoting *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982)).

The Eleventh Circuit reversed the preliminary injunction, Pet. App. 171a-189a, but the *HRC* district court then entered several further injunctions on other grounds. See Pet. App. 199a-202a. In late January 1992, the government sought emergency relief from the Eleventh Circuit, supported by evidence that the bar to repatriations was exacerbating the situation by providing an incentive for Haitians to take to the seas. When the Eleventh Circuit failed to act promptly, this Court granted a stay pending appeal and thus permitted repatriations to resume. 112 S. Ct. 1072 (Jan. 31, 1992).

A few days later, the Eleventh Circuit rendered its decision, reversing the remaining injunctions and ordering dismissal of the action. Pet. App. 190a-252a. The Eleventh Circuit noted that the district court had followed "settled law" in holding that the Haitian interdictees, "who were not present in the United States, had no rights under the United States Constitution and therefore their Fifth Amendment claim must fail." *Id.* at 200a. It also held that neither Executive Order No. 12,324 nor implementing INS guidelines afforded interdictees any enforceable rights, Pet. App. 216a-219a, and that the plaintiff organizations had no First Amendment right of access to Haitian migrants at Guantanamo, Pet. App. 219a-227a. This Court denied the *HRC* plaintiffs' application for a stay and petition for a writ of certiorari on February 24, 1992. 112 S. Ct. 1245.

3. a. Less than a month later, respondents filed this suit in the Eastern District of New York, raising essentially the same challenges to the interdiction program that had been rejected in *HRC*. See 92-6090 C.A. App. 11-32 (Complaint). The suit was apparently prompted in part

by a memorandum from the General Counsel of INS, Grover Joseph Rees, dated February 29, 1992. PX 1 (92-6090 C.A. App. 141-142). That memorandum addressed the special situation of those interdictees who were tentatively screened in but found to have a communicable disease (most often the HIV virus). The INA requires that persons with communicable diseases of public health significance "shall be excluded from admission into the United States." 8 U.S.C. 1182(a)(1). However, under the INA's provisions for admission of refugees from outside the United States, the Attorney General may waive that (and certain other) exclusions "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. 1157(c)(3). The INA further provides that the Attorney General may temporarily parole aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest," 8 U.S.C. 1182(d)(5)(A), but an alien who is a refugee may be paroled under that provision (rather than admitted as a refugee under 8 U.S.C. 1157) only if the Attorney General finds parole to be "require[d]" by "compelling reasons in the public interest." 8 U.S.C. 1182(d)(5)(B).

INS General Counsel Rees concluded that where parole would be premised on the possibility that the alien may be a refugee, but the alien is excludable on medical grounds, the judgment whether "compelling reasons" require parole should be based on the same factors (quoted above) that must inform the decision whether to waive the medical exclusion under the INA's special refugee admission provisions. General Counsel Rees decided that under this standard, the alien, at a minimum, should actually be a "refugee" under the INA. He accordingly directed that an interdictee who has been screened in as a possible refugee, but has a communicable disease of public health significance, should be interviewed further at Guantanamo to determine whether he is in fact a refugee. The General Counsel stated that assessments of interdictees who appear

credible and whose accounts, if true, would establish a well-founded fear of persecution should be forwarded to the State Department for information concerning the accuracy of the applicant's assertions about his own experience and country conditions. 92-6090 C.A. App. 142.

b. On April 6, the district court entered a preliminary injunction that (i) required petitioners to grant the respondent organizations immediate "access" to the individual interdictees housed at Guantanamo, and (ii) enjoined petitioners from reinterviewing or repatriating any interdictees who previously had been screened in, without first allowing them to communicate with counsel. Pet. App. 85a, 142a-163a.[4] The court rejected respondents' contention that the statutory right to counsel conferred by 8 U.S.C. 1362 in deportation and exclusion proceedings extends to the reinterviews at Guantanamo, because the Base is outside the "United States" for purposes of INA. Pet. App. 155a-156a (citing 8 U.S.C. 1101(a)(38)). But the court believed that sufficiently "serious questions" had been raised to furnish a fair ground for litigation on whether the screened-in migrants at Guantanamo have a right under the Due Process Clause to have access to counsel, and whether the respondent organizations have a First Amendment right of access to communicate with screened-in migrants there. Pet. App. 152a-155a, 157a-160a. The court certified a class of "screened-in plaintiffs" entitled to relief under the preliminary injunction. *Id.* at 161a-162a.[5] After unsuccessfully seeking a stay in the Second Circuit, the government sought relief in this

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[4] The district court previously had entered a temporary restraining order granting much the same relief. See Pet. App. 125a-141a.

[5] In its April 8, 1992, order denying petitioners' motion for a stay pending appeal, the district court stated that even if the appropriate standard were "likelihood of success on the merits,"

Court, which granted a stay on April 22, 1992. 112 S. Ct. 1714.

4. On June 10, 1992, a divided panel of the court of appeals vacated those portions of the preliminary injunction that required the government to grant the respondent organizations immediate access to Guantanamo, but affirmed the prohibition against further interviewing or repatriation of "screened in" interdictees without affording them an opportunity to communicate with counsel. Pet. App. 73a-124a.

The court first concluded that respondents' due process claim is not barred under collateral estoppel principles by the district court's holding in the *HRC* class action that Haitian interdictees outside the United States have no rights under the Due Process Clause in connection with their entry into the United States. Pet. App. 86a-96a. The court did not dispute that the screened in plaintiffs in this case fall within the class in *HRC*, which consists of "all Haitian aliens who are currently detained or who will in the future be detained * * * at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights." *Id.* at 87a. But it believed that there was not sufficient community of interest between the screened-in plaintiffs here and the remainder of the *HRC* class to warrant application of collateral estoppel. In the court's view, the *HRC* litigation focused on allegations by "screened out" migrants that the initial screening procedures were inadequate, and it noted that Haitian migrants who had been "screened in" under those procedures would not have been likely to challenge them as inadequate. *Id.* at 94a-96a. The court also justified its

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rather than "sufficiently serious questions" going to the merits, that higher standard had also been satisfied. 92-6090 C.A. App. 105-108; Pet. App. 84a-85a.

refusal to apply collateral estoppel on the ground that the procedure outlined in the February 29, 1992 Rees memorandum for reinterviewing at Guantanamo those "screened in" migrants who have communicable diseases constituted a material change in INS policy. *Id.* at 96a.

On the merits, the court of appeals held that the proper standard for assessing the propriety of a preliminary injunction is not whether respondents had shown a likelihood of success on the merits, but rather whether they had raised "sufficiently serious questions going to the merits," coupled with a balance of hardships tipping decidedly in their favor. Pet. App. 96a-98a. Applying that standard, the court concluded that the Haitian respondents had at least raised a serious question on their claim of a due process right of access to counsel at Guantanamo. *Id.* at 99a-115a. It recognized that under this Court's precedents, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application," and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 101a (quoting *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), and *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950)). The court further recognized that Congress has not authorized any particular procedures applicable to the interdicted Haitians at Guantanamo, since (as the district court held) the asylum and other relevant provisions of the INA and implementing regulations apply only within the United States. Pet. App. 101a-102a. But the court thought that the Due Process Clause nonetheless has independent force in this setting because the aliens involved are at a location subject to plenary U.S. control, Pet. App. 103a-109a, and have been "screened in" as possible candidates for refugee status, *id.* at 109a-115a.

The court found the policy of interdicting Haitian migrants and bringing them to Guantanamo to be consistent with the 1981 Agreement between the United States and

Haiti and the U.N. Protocol (see page 5 and note 3, *supra*), and observed that "[b]y these humanitarian actions alone, it does not appear that the legal status of the aliens was altered." Pet. App. 112a. But the court believed that the subsequent "screening in" of an interdictee "implicates the Agreement between the United States and Haiti[6], the Refugee Act of 1980 [which amended 8 U.S.C. 1253(h) 7], the Executive Order and the Protocol, to which we are a signatory." Pet. App. 112a-113a. As the court saw it, those measures created a "reasonable expectation" on the part of screened-in interdictees that they would not be "wrongly repatriated," because upon being screened in, their "fundamental legal and human rights status is changed vis-a-vis the United States government." *Id.* at 113a. This "altered status," the court concluded, meant that the interdictees are entitled in their reinterviews to due process rights, which, in its view, include the advice of counsel. *Id.* at 113a-115a.[8]

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[6] The Agreement provided, *inter alia*, that the United States "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." See App., *infra*, 4a; Pet. App. 75a.

[7] As amended, 8 U.S.C. 1253(h) provides, subject to certain exceptions, that "[t]he Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of * * * political opinion."

[8] The court affirmed the district court's findings that the "screened in" but medically excludable migrants would suffer irreparable injury in the absence of an injunction and that the balance of hardships weighed in their favor. Pet. App. 99a, 115a-117a. The court also stated that to the extent the "likelihood of success on the merits" standard applies, it was "inclined to agree" with the district court that that higher standard was met as well. *Id.* at 117a n.19. The court did not address the merits of the respondent organizations' First Amendment claim of a right of access to Guantanamo. It nevertheless vacated that portion of the injunction because it went beyond maintenance of the status quo and because the First Amendment issue would have been effectively decided with

b. Judge Mahoney dissented. Pet. App. 118a-124a. He noted that this Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the *sovereign territory* of the United States," *id.* at 120a (quoting *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990)), and that in the lease agreement governing Guantanamo Bay, the United States recognizes the "ultimate sovereignty" of Cuba over the Base. Pet. App. 120a (quoting Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.I.A.S. No. 418). Judge Mahoney further observed that "Congress has vested the Attorney General with almost complete discretion, within numerical limits, to permit immigration of refugees from outside the country's borders." Pet. App. 119a. Here, he reasoned, "the initial screening interview is simply one step in the process for an alien interdicted at sea to gain admission into this country," and "Congress has explicitly authorized the executive to exclude an alien seeking admission who is determined to have a communicable disease." *Id.* at 123a. "It accordingly seems curious," Judge Mahoney concluded, "that a second screening interview of an individual located outside this country, designed to gather information that might aid the Attorney General in reaching a determination whether to exercise his discretion and waive the exclusion, would run afoul of the Constitution." *Ibid.* (citation omitted).

c. The Second Circuit denied the government's petition for rehearing with suggestion of rehearing en banc on July 24, 1992. App., *infra*, 1a. Because the June 10 decision does not require petitioners to grant the respondent organizations immediate access to Guantanamo and affects for now only the several hundred screened-in Haitians at Guantanamo who have communicable diseases and who therefore await further interviews there (see note 18,

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finality at the preliminary injunction stage if the organizations had been granted such access. *Id.* at 100a, 116a.

infra), petitioners have not yet found it necessary to seek emergency relief by applying for a stay in this Court.[9]

5. As we explain in our certiorari petition (at 7-9) in No. 92-344, while the appeal of the preliminary injunction at issue here was still pending before the Second Circuit, the Haitian migrant situation once again reached crisis proportions. The President decided to continue the interdiction program but to repatriate all interdictees directly to Haiti, and to provide instead for processing of applications for refugee admission to the United States at our Embassy in Port-au-Prince, pursuant to 8 U.S.C. 1157. That decision was embodied in Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992), issued May 24, 1992, which revoked and replaced Executive Order No. 12,324. The May 24 Executive Order does not require any screening of interdicted Haitian migrants, but it provides that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." § 2(c)(3).

On July 29, 1992, the Second Circuit, in another sharply divided decision, ordered entry of a preliminary injunction barring implementation of Executive Order No. 12,807. Pet. App. 1a-72a. This Court granted a stay of that decision on August 1, 1992, and on August 24, we filed our certiorari petition in No. 92-344, seeking review of the July 29 decision.

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[9] Although petitioners have not yet sought a stay of the Second Circuit's decision, the situation at the Guantanamo Naval Base is becoming increasingly difficult. Many of the Haitian migrants have been at the Naval Base for several months, and we are informed by U.S. military officials at Guantanamo that many of the migrants have expressed a strong preference to return to Haiti, rather than to wait longer at Guantanamo. The Second Circuit's decision, however, may well bar such voluntary repatriations. In addition, some of the migrants infected with the HIV virus face increasing medical complications. For example, over the past few weeks, the Government has brought several migrants to the United States for emergency medical care, including several HIV-positive pregnant women.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly held that control over immigration lies with the political Branches, which have exclusive authority to prescribe standards and procedures for admission of aliens to this country. It is absolutely clear under this Court's cases that aliens outside the United States who are seeking initial entry have no rights under the Due Process Clause. The Second Circuit has created, out of whole cloth, an unprecedented exception to that principle. It has determined, for purposes of granting a preliminary injunction, that Haitian interdictees at Guantanamo Bay, Cuba, may assert a due process right to the assistance of counsel in connection with their applications for admission, and it has halted any further interviewing of screened-in interdictees at Guantanamo until counsel has been made available. That holding has not only disrupted the informal and non-adversarial refugee processing at Guantanamo; it also has undermined the flexibility the political Branches may require in the future to respond to unfolding developments in the Haitian migrant crisis. And as a legal matter, the holding below constitutes such a sharp departure from established precedent that summary reversal is appropriate.

Furthermore, even if the Due Process Clause might be judicially extended to some immigration matters beyond our borders, the Clause would still not be triggered unless the alien concerned could point to some "liberty" interest. None of the sources cited by the court of appeals—Article 33.1 of the U.N. Convention; Section 243(h) of the INA, 8 U.S.C. 1253(h); Executive Order No. 12,324 (which has since been revoked); and the 1981 Agreement between the United States and Haiti—confers any such liberty interest on Haitian interdictees outside the United States. Respondents' due process claim must fail for this additional reason as well.

The Second Circuit's ruling on the due process issue is all the more disturbing because the legal principles gov-

erning this case were reaffirmed less than a year ago in the *HRC* v. *Baker* class action challenging the interdiction program. There, the court correctly held that the Due Process Clause has no application to interdictees' efforts to enter the United States. The Haitian interdictees in this case were parties to *HRC* and are bound by that holding. They also are bound by the further holding in *HRC* that Haitian aliens outside the United States have no rights under Article 33.1 of the U.N. Convention, 8 U.S.C. 1253(h), or Executive Order No. 12,324, which fatally undermines the respondent interdictees' reliance on those provisions in this case as a predicate for establishing a liberty interest protected by the Due Process Clause. Accordingly, if the Court believes that plenary review is appropriate, it should reverse the Second Circuit's threshold refusal to apply the doctrine of collateral estoppel to bar respondents' due proces claim.

1.a. The court of appeals' reliance on the Due Process Clause in affirming an injunction barring further processing or repatriation of the interdictees at Guantanamo unless they are afforded access to counsel squarely conflicts with this Court's precedents. Contrary to the court of appeals' view, Pet. App. 99a-113a, there can be no "serious question" that the Due Process Clause is altogether inapplicable in this setting.

As this Court has stated repeatedly, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). Although aliens who have entered the United States are entitled to constitutional protections in a deportation proceeding, "an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S.

537, 544 (1950)). These principles have repeatedly been recognized by this Court. See, e.g., *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892); *The Japanese Immigrant Case*, 189 U.S. 86, 97, 100 (1903); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953);[10] cf. *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972).

The Court reaffirmed these principles just several terms ago in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990). There, the Court observed that although "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," *id.* at 271, it "ha[s] rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," *id.* at 269 (discussing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)). The courts of appeals, including the court below, likewise have reiterated the rule that aliens have no constitutional rights in connection with their initial entry into the United States.[11] The court of appeals therefore plainly erred in holding that respondents—who are aliens outside the United States seeking initial entry—have raised a "serious question" going to the merits of their due process claim of a right of access to counsel in connection with their applications for admission.

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[10] The Court stated in *Kwong Hai Chew:* "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." 344 U.S. at 596 n.5 (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

[11] See *Rafeedie* v. *INS*, 880 F.2d 506, 520 (D.C. Cir. 1989) (quoted at page 19, *infra*); *Augustin* v. *Sava*, 735 F.2d 32, 36 (2d Cir. 1984) (aliens petitioning for admission are "requesting a privilege" and "have no constitutional rights regarding their applications"); *Jean* v. *Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (en banc) ("Aliens seeking admission * * * must be content to accept whatever statutory rights and privileges they are granted by Congress"), aff'd on other grounds, 472 U.S. 846 (1985).

b. In concluding that respondents may nevertheless have rights under the Due Process Clause, the court of appeals cited two factors. First, the court found it significant that the interdictees involved are housed at the U.S. Naval Base at Guantanamo, which is subject to U.S. jurisdiction and control. Pet. App. 103a-109a. Second, it relied upon respondents' "screened in" status, as interdictees who have been tentatively deemed to possess at least a plausible claim to refugee status. *Id.* at 109a-115a. Neither of these factors, however, furnishes any justification whatever for the court's holding.

i. The court of appeals' notion that the geographical reach of the Due Process Clause might be extended to the group of aliens seeking entry in this case because of the United States' occupation of the Naval Base at Guantanamo Bay is without merit for two independent reasons. First, the rights of the United States at Guantanamo Bay arise only from its status as a lessor under the 1903 agreement with Cuba (quoted at Pet. App. 105a). Those rights do not include the prerogatives of sovereignty, which the United States does not claim with respect to Guantanamo. As Judge Mahoney pointed out below, Pet. App. 120a, that much is established by the 1903 Agreement itself, which expressly provides that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [specified] areas of land and water." This case accordingly is controlled by the Court's previous rejection of "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269.

Second, the well-settled principle that an alien seeking admission to this country has no rights under the Due Process Clause (but must instead accept whatever procedures are provided by statute and regulation) applies even where the alien has reached a port of entry and is detained within the United States pending determination of his application for admission. Thus, in *Mezei*, the

Court held that, although the alien was detained at Ellis Island, he enjoyed no procedural rights beyond those afforded by statute. It explained that the alien's "harborage at Ellis Island is not an entry into the United States" and that his confinement within U.S. borders did not "transform[] this into something other than an exclusion proceeding." 345 U.S. at 213; see also *Knauff*, 338 U.S. at 542; *Nishimura Ekiu*, 142 U.S. at 659-660. *A fortiori*, the United States' exercise of jurisdiction and control over a Naval Base in a hostile foreign country does not extend the protections of the Due Process Clause to aliens who are temporarily housed there.[12]

The Eleventh Circuit relied on the foregoing decisions in applying to Haitian migrants detained at INS facilities in Florida the rule that "[a]liens seeking admission to the United States * * * have no constitutional rights with regard to their applications." *Jean* v. *Nelson*, 727 F.2d at 968. The Second Circuit's reliance on the Due Process Clause to afford rights to aliens at facilities in a foreign country necessarily conflicts with that ruling by the Eleventh Circuit, as well as this Court's own decisions and the district court's ruling in the *HRC* class action.

ii. Quite aside from the inapplicability of the Due Process Clause as a geographical matter, respondents have no liberty interest that would be protected by that Clause in connection with interviews at Guantanamo. There can be no claim here, as there might be in other settings, that

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[12] Executive officials routinely make determinations with respect to immigration and refugee status at locations abroad that are subject to extensive U.S. control, such as U.S. embassies. But the characteristics of the location at which such determinations are made has never been thought to affect the rights of applicants. It is settled, for example, that a visa applicant at an embassy has no procedural rights regarding his application. See *Yiu Sing Chun* v. *Sava*, 708 F.2d 869, 875 (2d Cir. 1983) (citing *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978)).

respondents have any liberty interest independent of rights created by statute or treaty or by implementing administrative measures that confer private rights. *Cf. Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990). As we have explained above, an alien applicant for initial admission "has no liberty (or other) interest in entering the United States, and thus has no constitutional right to *any* process in that context; whatever Congress by statute provides is obviously sufficient, so far as the Constitution goes." *Rafeedie* v. *INS*, 880 F.2d at 520.

The court of appeals believed, however, that "[u]pon being 'screened in,' the Haitian aliens' fundamental legal and human rights status is changed vis-a-vis the United States government," because, in its view, " 'screening in' implicates the Agreement Between the United States and Haiti, the Refugee Act of 1980, the Executive Order and the Protocol." See Pet. App. 113a. The court was completely mistaken. Those provisions neither refer to the screening process at issue here nor indicate what procedures might be used to identify refugees outside the United States. But more fundamentally, those provisions do not confer any substantive rights upon aliens beyond our borders:

First, the court of appeals itself recognized that the U.N. Protocol "does not grant rights beyond those afforded under this nation's domestic law," Pet. App. 110a n.13—a view that is consistent with prior Second Circuit holdings and with the decision of every other court of appeals that has considered the question.[13] Furthermore, as we explain in our certiorari petition in No. 92-344 (at

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[13] *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982); *Chim Ming* v. *Marks*, 505 F.2d 1170, 1172 (2d Cir. 1974), aff'g, 367 F. Supp. 673, 677-679 (S.D.N.Y. 1973); *HRC* v. *Baker*, Pet. App. 173a; *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 111 S. Ct. 751 (1991); *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir.), vacated on other grounds, 434 U.S. 962 (1977); *HRC* v. *Gracey*, 600 F. Supp. 1396, 1401, 1406 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).

21-26), Article 33 of the U.N. Convention (to which the United States adhered by virtue of ratifying the Protocol) does not in any event apply to aliens outside the territory of the Contracting State.

Second, as we also explain in our petition in No. 92-344 (at 17-28), 8 U.S.C. 1253(h), as amended by the Refugee Act of 1980, likewise does not apply to aliens outside the United States. Its geographical reach therefore is no broader than that of the asylum provision of the INA, which was also added by the Refugee Act of 1980 and which (as the court below recognized, Pet. App. 101a-102a) is limited to aliens "physically present in the United States or at a land border or port of entry." 8 U.S.C. 1158(a).

Third, Executive Order No. 12,324 was revoked prior to the court of appeals' decision (see page 13, *supra*), and thus could furnish no basis for finding a protected liberty interest. In any event, the Executive Branch officials charged with implementation of the Executive Order authoritatively construed it not to confer private rights on interdictees, and the Eleventh Circuit so held in *HRC*. See Pet. App. 216a-218a.[14]

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[14] The Executive Order's statement that "no person who is a refugee will be returned without his consent" (Pet. App. 265a) was a mere proviso to the President's description of what the internal instructions from the Secretary of Transportation to the Coast Guard regarding the interdiction program should include—specifically, a requirement that the Coast Guard return the interdicted vessel and its passengers to the country from which it came, if there was reason to believe an offense was being committed. "[B]ecause a proviso can only operate within the reach of the principal provision it modifies," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 690 (1992), the proviso was part of the internal instructions to the Coast Guard, rather than a source of personal rights for individuals external to the Coast Guard's operations. Furthermore, as the Eleventh Circuit pointed out, Pet. App. 217a-218a, the Executive Order contemplated interdiction and screening on the high seas, under exigent circumstances and with prompt repatriation of aliens found not to qualify for refugee status. An Executive Order

Fourth, the 1981 Agreement with Haiti confers no private rights on interdictees that could form the basis for a liberty interest protected by the Due Process Clause. That document is essentially a law enforcement agreement between two governments. The portion on which the court below relied (see note 6, *supra*) can only reasonably be construed to put the Government of Haiti on notice of the U.S. Government's then-present intention not to repatriate refugees; it accordingly served the purposes of the U.S. Government, not the Haitian Government or its nationals.

c. The court of appeals also failed to view the screening decision in the context of the interdiction program as a whole. At the time when the INS was bringing interdictees to Guantanamo, it had decided to use a two-step process to determine whether they were refugees—initial screening, followed by a more complete examination (either in asylum proceedings in the United States or at Guantanamo) of those interdictees who are tentatively screened-in. As Judge Mahoney explained, " 'screening in' of a Haitian alien [did] not determine whether the alien is a 'refugee' or is entitled to admission to the United States." Pet. App. 123a. It simply "mean[t] that after a preliminary interview, someone ha[d] been identified as *possibly* having refugee characteristics." Rees Dep. at 5 (emphasis added) (92-6090 C.A. App. 341). Thus, although the decision to screen in an interdictee might have increased the likelihood that he would ultimately be found to be a refugee, it did not, in itself, affect his legal status or rights. To the contrary, because the initial screening was "simply one step in the process for an alien interdicted at sea to gain admission to this country," Pet. App. 123a (Mahoney, J., dissenting)—and because interdictees have no rights under the Fifth Amendment in connection with that overall process—the fact that an interdictee made a

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applicable to such conditions should not lightly be construed to confer substantive or procedural rights of the sort that could give rise to liberty interests protected by the Due Process Clause.

sufficient threshold showing to get past the initial stage plainly did not trigger any rights under the Due Process Clause at later stages.

d. For the foregoing reasons, the Second Circuit's reliance on the Due Process Clause to support a preliminary injunction barring further interviews or repatriation of interdictees at Guantanamo until they have been given access to an attorney is utterly without merit.[15] Because it conflicts with numerous decisions of this Court and rulings by other courts of appeals, review is warranted. And because the Second Circuit's error is so clear, we believe that summary reversal would be appropriate.

2. The court of appeals should not even have reached the merits of respondents' due process challenge to the screening procedures utilized by the INS at Guantanamo. That challenge is barred as a threshold matter under collateral estoppel principles by the judgment in the *HRC* class action, which held that Haitian interdictees outside the United States have no rights under the Due Process Clause in connection with their efforts to enter the United States.

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[15] Moreover, even if we assume, *arguendo*, that the Due Process Clause confers some rights on an alien in this setting, it does not follow, contrary to the court of appeals' almost casual conclusion (see Pet. App. 115a), that a right of access to counsel is among them. What process is due in any giving setting depends on a balancing of the respective interests. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Here, an informal, non-adversarial procedure, coupled with an investigation of in-country conditions by the State Department where the interview indicates that is called for (see pages 7-8, *supra*), more than satisfies whatever standards the Due Process Clause might demand, especially in view of the foreign setting of the refugee processing. Cf. *Washington* v. *Harper*, 494 U.S. 210, 236 (1990); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985). Indeed, the interdictees involved in this case, by successfully passing the threshold screening stage, have already demonstrated their ability to communicate the basis for their claims to be refugees without the assistance of counsel.

a. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); see also *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984). As the court of appeals recognized, Pet. App. 93a, this rule is fully applicable to the judgment in a class action. *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874, 880 (1984).

The *HRC* litigation resolved the question of the reach of the Due Process Clause in this setting. Invoking that Clause, the plaintiff class in *HRC* challenged the procedures by which the INS interviewed Haitian interdictees at Guantanamo (and on the high seas) to determine whether they should be repatriated to Haiti. The *HRC* district court rejected that challenge. It recognized that, although aliens within the United States are entitled to due process regarding immigration matters, the "Supreme Court 'has long held that an alien *seeking* admission to the United States requests a privilege and has no constitutional rights regarding his application.' " Stay App. 220 (quoting *Landon* v. *Plasencia*, 459 U.S. at 32). The plaintiffs did not appeal that holding, and the Eleventh Circuit later noted that it was dictated by "settled law." Pet. App. 200a.

Moreover, the plaintiff class in *HRC* is defined in terms that unquestionably include the "screened in" plaintiffs in this case. It consists of—

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

Pet. App. 87a. The Second Circuit did not dispute that the screened-in Haitian interdictees in this case are in-

cluded in the *HRC* class. It follows that the judgment in *HRC* forecloses their due process claim here.

b. The court of appeals nevertheless refused to apply collateral estoppel. It pointed out that the named plaintiffs in *HRC* were Haitian interdictees who had been screened out and that the *HRC* litigation focused on allegations that the initial screening procedures were inadequate. By the same token, the court observed that interdictees who were screened in on the basis of those initial screening procedures would have been unlikely to challenge them as inadequate. For these reasons, it believed that there was not sufficient "community of interests" between the screened in Haitian interdictees before the Court here and the other members of the *HRC* class to warrant application of collateral estoppel. Pet. App. 88a, 93a-96a. This rationale for avoiding the preclusive effect of *HRC* is without merit.

Even if we assume, *arguendo*, that the Haitian interdictees who were ultimately screened in might not have had a full community of interests with other members of the *HRC* class on certain issues, the question whether interdictees housed at Guantanamo have rights protected by the Due Process Clause in seeking admission to the United States surely is not among them. On *that* issue, there is no reason to doubt that the named plaintiffs in *HRC* fully and fairly represented the interests of those members of the *HRC* class who already had been or later were screened in.[16]

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[16] The court of appeals got it backwards by focusing on whether screened-in interdictees would have been likely to challenge the adequacy of the initial screening procedures under the Due Process Clause. See Pet. App. 94a, 96a. The adequacy of the initial screening procedures—and the question whether the interdictees who have since been screened-in would be adequate representatives of a class challenging those procedures—are not involved here. Rather, the relevant question for present purposes is whether the named plaintiffs in *HRC* adequately represented the interests of the interdictees here in arguing that the Due Process Clause may apply to refugee processing at Guantanamo. For the reasons stated in the text, they did.

Nor would it have been either sensible or feasible to divide the *HRC* class into subclasses of "screened in" and "screened out" interdictees, as the court of appeals suggested. See Pet. App. 94a. The vast majority of the Haitian migrants who were ultimately interdicted during the pendency of the *HRC* litigation had not been either screened in *or* screened out when the class was proposed and certified. It therefore is not surprising that the named plaintiffs in *HRC* focused their attention on establishing more elaborate procedures for the initial screening interviews. Such relief, if granted, obviously would not have been limited to interdictees who had already been screened out at the time the motion for class certification was filed or granted. Under these circumstances, the district court in *HRC* can hardly be faulted for accepting the all-inclusive class definition proposed by the *HRC* plaintiffs, who were mounting a broad challenge to the interdiction program on behalf of *all* interdictees.[17]

The court of appeals also relied in passing on the fact that the February 29 Rees memorandum was not issued until after the judgment was entered in *HRC*. Pet. App. 96a. That rationale for avoiding collateral estoppel is equally flawed. Although this Court has recognized that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues," *Montana* v. *United States*, 440 U.S. 147, 159 (1979), the Rees memorandum was not such a change. The *HRC* court did not reject the plaintiff due process claim of the plaintiff class because it found the procedures then in place to be adequate; its holding rested on the conclusion that the Due Process Clause affords *no* protection to aliens seeking entry into the United States. Although the respondents have characterized this suit as a challenge to the newly announced policy

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[17] "It has long been the law that questions concerning class certification are left to the sound discretion of the district court." *Walker* v. *Jim Dandy Co.*, 747 F.2d 1360, 1363 (11th Cir. 1984); *accord Stott* v. *Haworth*, 916 F.2d 134, 139 (4th Cir. 1990); *Becker* v. *Schenley Indus., Inc.*, 557 F.2d 346, 348 (2d Cir. 1977).

of the Rees memorandum, their challenge can succeed only if the courts below reject the *HRC* court's holding that the Due Process Clause confers no procdural rights on aliens seeking to enter the United States. Cf. *Montana*, 440 U.S. at 159-160; Pet. App. 45a-49a (July 29 decision) (Walker, J., dissenting). Collateral estoppel prevents such evasion of an adverse judgment.

c. The class-action challenge to the interdiction program in *HRC* was deliberately cast by the HRC plaintiffs in broad terms, and it was litigated by the government and decided by the courts in the government's favor on that basis. As a result, the central teaching of *HRC* is that the various provisions of the Constitution, treaties and laws of the United States invoked by the Haitian interdictees in that case do not circumscribe the broad discretion of the President and those in the Executive Branch who implement the interdiction program on his behalf. That teaching cannot be ignored here simply because the responsible Executive Branch officials have exercised the very discretion that was confirmed by the judgment in *HRC* to revise the screening procedures. The refusal by the Second Circuit to enforce the collateral estoppel consequences of the due process holding in *HRC* therefore invites renewed challenges to the interdiction program every time the President or his subordinates find it necessary to adapt the program in light of experience or changed circumstances.

3.a. The decision below warrants review by this Court. The injunction affirmed by the Second Circuit threatens greatly to interefere with the implementation of the interdiction program established by the President. The Executive Branch officials concluded that the interdictees who have communicable diseases should be reinterviewed at Guantanamo, in order to inform the Attorney General's judgment about whether to waive the medical exclusion for particular interdictees and to parole those interdictees into the United States or admit them as refugees. Those determinations, and the procedures used to

make them, are wholly discretionary with the Attorney General. Exercising that authority, the INS concluded that an informal interview procedure would be most appropriate and expeditious, and that the assistance of counsel was neither necessary nor consistent with that procedure. The decision below has already interfered with the ability of the INS to complete the rescreening process expeditiously; and if it remains in effect, it will improperly encumber and formalize that process. At the present time alone, the injunction affects determinations yet to be made with respect to 291 Haitian interdictees at Guantanamo.[18]

In addition, the decision below, if allowed to stand, would as a practical matter limit the available options in responding to changed circumstances. It might, for example, rule out the possibility of directing that all interdictees shall once again be brought to Guantanamo, but with the modification that full refugee determinations concerning interdictees who make a sufficient threshold showing will be made there, rather than in asylum proceedings in the United States.

b. As we have explained above, the Second Circuit's reliance on the Due Process Clause to require that screened-in interdictees have access to attorneys before they are reinterviewed or repatriated is flatly inconsistent with settled precedent and should be summarily reversed. But if the Court believes that plenary review is warranted, it should grant review on the collateral estoppel issue as well. That issue is important in its own right,

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[18] We have been informed by the INS that there are currently at Guantanamo 230 interdictees who were screened in but are infected with the HIV virus and thus are ineligible for admission absent a waiver by the Attorney General, and an additional 61 immediate relatives of such individuals. All other interdictees brought to Guantanamo prior to May 24 have either been repatriated to Haiti or paroled into the United States. Several HIV-positive migrants, including several HIV-positive pregnant women, at Guantanamo have been brought to the United States for medical treatment.

because the Second Circuit's limited view of the preclusive effect of the judgment in *HRC* exposes the interdiction program to repeated judicial challenges and second-guessing. That issue also is logically antecedent to the merits of respondents' due process claim, and the Court therefore should review the Second Circuit's refusal to enforce that threshold bar to respondents' due process claim if it concludes that the decision below should be considered more fully than a summary disposition might allow.

c. In the alternative, if the Court decides not to make a summary disposition at this time, it may wish to consider holding this petition pending the disposition of *McNary* v. *Haitian Centers Council, Inc.*, No. 92-344 (filed Aug. 24, 1992). That is because—if we put to one side the aspect of the due process issue that is controlled by this Court's precedents and therefore warrants summary reversal—there is much commonality among the issues raised in the two petitions. For example, we argue in our certiorari petition in No. 92-344 (at 17-28) that Article 33.1 of the U.N. Convention and 8 U.S.C. 1253(h) are inapplicable to aliens outside the United States, and respondents state in their brief in opposition (at 10 n.11) in No. 92-344 that they intend to rely on the 1981 Agreement between United States and Haiti as an alternative ground for affirmance there. If the Court grants certiorari in No. 92-344 and agrees with our position that those provisions confer no rights on interdictees, its holding will establish that the Second Circuit erred in relying on those same provisions in its June 10 decision in holding that interdictees at Guantanamo have a protectible liberty interest because their legal position was altered when they were "screened in."

We also argue in our petition in No. 92-344 (at 14-17) that the Haitian interdictees' claims are barred under collateral estoppel principles by the judgment in *HRC*, just as we argue here that collateral estoppel bars their due process claim in light of the *HRC* district court's holding

that the Due Process Clause is inapplicable to aliens at Guantanamo seeking initial entry into the United States. Moreover, among the other issues that the interdictees in this case are barred from relitigating are whether Article 33 of the Convention, 8 U.S.C. 1253(h), or Executive Order No. 12,324 affords them any private rights that could, in turn, give rise to a liberty interest protected by the Due Process Clause. The Eleventh Circuit in *HRC* held that Haitian interdictees have no rights under any of those provisions. A ruling by this Court in No. 92-344 regarding the collateral estoppel effect of those holdings in *HRC* might shed light on the collateral estopepl effect to be given those same holdings in these proceedings on the due process issue. For this reason as well, the Court may wish to hold this petition pending the disposition in No. 92-344 if it chooses not to summarily reverse the judgment below at the present time.

CONCLUSION

The Court should summarily reverse the judgment below, on the ground that Haitian interdictees outside the United States have no rights under the Due Process Clause in connection with their applications for admission to the United States. If the Court concludes that summary reversal is appropriate, it should limit the grant of certiorari to question 1 in this petition, which presents the due process issue. However, if the Court concludes that plenary review is warranted, it should also grant certiorari on the collateral estoppel issue presented by question 2. In the alternative, the Court may wish to hold this petition and dispose of it as appropriate in light of the disposition in *McNary* v. *Haitian Centers Council, Inc.*, petition for cert. pending, No. 92-344 (filed Aug. 24, 1992).

Respectfully submitted.

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SEPTEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of July, one thousand nine hundred and ninety-two.

Docket Number: 92-6090 (L)
92-6104

HAITIAN CENTERS COUNCIL, INC., ET AL.,
PLAINTIFF-APPELLEES

v.

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
DEFENDANT-APPELLANTS

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, Commander, US Naval.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Mahoney dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX B

CONSTITUTIONAL PROVISION AND INTERNATIONAL AGREEMENT INVOLVED

1. The Due Process Clause of the Fifth Amendment of the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

2. The Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241, provides:

HAITI

Migrants—Interdiction

Agreement effected by exchange of notes
Signed at Port-au-Prince September 23, 1981;
Entered into force September 23, 1981.

The American Ambassador to the Haitian Secretary of State for Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
PORT-AU-PRINCE, HAITI

No. 237 September 23, 1981

Excellency:

I have the honor to refer to the mutual concern of the Governments of the United States and of the Republic of Haiti to stop the clandestine migration of numerous residents of Haiti to the United States and to the mutual desire of our two countries to cooperate to stop such illegal migration.

The United States Govenment confirms the understandings discussed by representatives of our two governments -

for the establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.

Having regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January 1967,* the United States Government confirms with the Government of the Republic of Haiti its understanding of the following points of agreement:

Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

The Government of the Republic of Haiti also agrees in the case of a U.S. flag vessel, outbound from Haiti, and engaged in such illegal trafficking, to permit, upon prior notification, the return to a Haitian port of that vessel and those aboard.

In any case where a Haitian flag vessel is detained, the authorities of the United States Government shall

promptly inform the authorities of the Government of the Republic of Haiti of the action taken and shall keep them fully informed of any subsequent developments.

The Government of the Republic of Haiti agrees, to the extent permitted by Haitian law, to prosecute illegal traffickers of Haitian migrants who do not have requisite permission to enter the country of the vessel's destination and to confiscate Haitian vessels or stateless vessels involved in such trafficking. The United States Government likewise agrees, to the extent permitted by United States law, to prosecute traffickers of United States nationality and to confiscate United States vessels engaged in such trafficking.

The Government of the United States agrees to the presence of a repreresentative of the Navy of the Republic of Haiti as liaison aboard any United States vessel engaged in the implementation of this cooperation program.

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

In furtherance of this cooperative undertaking the United States Government formally requests the Government of the Republic of Haiti's consent to the boarding by the authorities of the United States Government of private Haitian flag vessels [in any case] in which such authorities have reason to believe that the vessels may be involved in the irregular carriage of passengers outbound from Haiti.

I have the honor to propose that, if the foregoing is acceptable to the Government of the Republic of Haiti, this note and Your Excellency's confirmatory reply con-

stitute an agreement between the United States Government and the Government of the Republic of Haiti which shall enter into force on the date of your reply and shall continue in force until six months from the date either government gives notice to the other of its intention to terminate the agreement.

Accept, Excellency, the renewed assurances of my highest consideration.

ERNEST H. PREZO

His Excellency
Edouard Francizque
Secretary of State for Foreign Affairs
Port-au-Prince

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